

COLANTONI (Migration) [2018] AATA 3902 (13 August 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Maria COLANTONI

CASE NUMBER: 1701276

DIBP REFERENCE(S): BCC2015/1598702

MEMBER: Karen McNamara

DATE: 13 August 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A to the Regulations.

- 1.
- 2.
3. Statement made on 13 August 2018 at 12:14pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – De factor partner of the sponsor – some pooling of finances – resides together – regular social activities – emotional support by applicant – registered relationship – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), s 5CB,
Migration Regulation (Cth), rr 1.09A, 2.03A, cls 820.111, 820.211*

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. On 2 June 2015, Ms Maria Colantoni, the applicant, applied for a Partner (Temporary) (Class UK) and BS Partner (Residence) Visa. The application was made on the basis of her relationship with Mr Giuseppe Lacalandra, the sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. On 13 January 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the applicant was the de facto partner of the sponsor. As a result the applicant did not satisfy cl.820.211(2)(a) and cl.820.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) made under the *Migration Act 1958* (the Act). This is a review of the delegate's decision.
8. The applicant appeared before the Tribunal on 28 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Giuseppe Lacalandra, Andre Casella, Isbel Casella, Nancy Cirillo and Teresa Trovato. The Tribunal hearing was conducted with the assistance of an interpreter in the Italian and English languages.
9. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

11. Background

12. The applicant was born in 1961 in Spadafora, Italy. She was divorced from her former husband in 2002. Ms Colantoni, has two children to her former husband, a daughter who lives in Italy and a son who is an Australian permanent resident. On 9 August 2014, she entered Australia on a UD (subclass 601) visa which was valid until 9 August 2015. On 2 June 2015 she lodged a Partner (subclass 820/801) visa application and was subsequently granted a bridging WA (subclass 010) visa on 4 June 2015.
13. The sponsor was born in 1955 in Italy and became an Australian resident in 1981. His former wife passed away in January 2014. He has three children who are Australian citizens.
14. The parties met in March 2014 after being introduced by their respective sons.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant and the sponsor are in a genuine and continuing de facto relationship as defined in s.5CB of the *Migration Act 1958* (the Act).

Whether the parties are in a spouse or de facto relationship

16. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian permanent resident.

Are the parties in a de facto relationship?

17. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). The Tribunal finds the parties are not related by family.
18. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
19. On these aspects, the Tribunal has considered all the evidence before it and is satisfied the facts of this case are as follows.

20. *Financial aspects*

21. The parties have a joint account with St George Bank. Both have debit cards linked to this account for payment of the day-to-day living expenses and household bills. Information before the Tribunal shows that the applicant's main source of income is directly deposited into this account. The sponsor is a self-funded retiree who occasionally receives cash from doing casual work. The sponsor has a separate personal bank account.
22. The parties had sound knowledge and presented detailed and consistent evidence of their financial affairs including, income, daily living expenses and payment of utility bills.
23. There is limited evidence before the Tribunal that the parties pool their financial resources. The parties do not have any joint ownership of real estate, any major assets or joint liabilities. The home is owned by the sponsor. The parties' income is derived from the applicant's salary and the sponsor's investments and occasional casual work. There is no evidence of any one person in the relationship owing any legal obligation in respect of the other. Overall, on balance the Tribunal places moderate weight on this aspect of the relationship and accepts that the parties pool some of their finances and work together to meet household expenses.

24. *Nature of the household*

25. The applicant has been living with the sponsor in the sponsor's home at Campsie NSW since March 2015. The couple provided detailed and consistent evidence about their living arrangements, personal history, household responsibilities, purchasing household items and their daily routine and activities. Correspondence has been provided addressed to both the applicant and the sponsor at the Campsie address. The address noted on the applicant's driver's licence is the Campsie address.
26. The Tribunal accepts that the information provided by the parties as to their living arrangements, supports that they live together and that they have established a joint household. The Tribunal accepts that they share the responsibility of the household duties

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29. Social aspects

30. The parties provided numerous statements from friends and family attesting to the fact that they represent themselves as being in a de facto relationship with each other and that their relationship is considered by their friends and family as being genuine, continuing and exclusive. At hearing, witnesses including Andre Casella, Isbel Casella, Nancy Cirillo and Teresa Trovato, told the Tribunal that they considered the couple to be in a genuine relationship and provided examples of social events where they have interacted with the applicant and sponsor.
31. The parties provided numerous photos of themselves together with their friends and relatives in Australia. They undertake regular social activities including dancing every Saturday and Sunday at Bankstown Sports Club and visit the applicant's son and his family every couple of weeks.
32. In consideration of the information before it, the Tribunal accepts that the relationship is socially recognised by family and friends.

33. Commitment

34. The applicant and sponsor claim to have known each other since 2014 following being introduced to each other by their respective sons. The parties have lived together on a permanent basis at the sponsor's home since March 2014. To date the relationship has lasted over four years.
35. The parties have provided evidence of the companionship and emotional support they provide to each other. The Tribunal heard from the sponsor that when he met the applicant he was newly widowed after being married for over 45 years. He was lonely and feeling depressed. He spoke of the emotional support the applicant has provided to him and the companionship they provide to each other.
36. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple mutually view their relationship as a long-term one.

37. Findings

38. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a de facto relationship at time of application and at the time of decision.
39. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian Permanent Resident who had turned 18.
40. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB(2) of the Act are met at the time the visa application was made and at the time of this decision.

41. Therefore the applicant meets cl.820.211(2) at the time of the application and, at the time of the decision, meets cl.820.221.
42. **Are the additional criteria for a de facto relationship met?**
43. Persons claiming to be in a de facto relationship for a Partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
44. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant state or territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the Visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
45. The applicant has provided evidence that the relationship is registered under the *New South Wales Relationships Register Act 2010* as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
46. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Karen McNamara
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).